

LABOR ACTIVITIES IN RESTRAINT OF TRADE: THE APEX CASE*

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ON May 27, 1940, the Supreme Court handed down its opinion in *Apex Hosiery Co. v. William Leader*.¹ This, a six to three decision, was the first important Sherman Act case involving labor activities to come squarely before the Court as now constituted. Moreover, as it had to do with the much condemned "sit-down" strike, with considerable attendant violence and property damage, and a complete stoppage of the employer's interstate commerce for some weeks, there was more than usual interest in seeing how the case would be handled. Not that the Sherman Act, about to celebrate its fiftieth birthday, had been rewritten by the present administration, for the contrary was true. But, still, there was some question how the new Court would read the Act and the many decisions construing it. It was, of course, clear to anyone with a pro-labor slant that some means had to be found—particularly as the suit was the archaic one for triple damages—whereby to take the case out of the Act.

THE PRELIMINARIES

In the court below the Apex Company had first brought suit for an injunction. The "sit-downers," as the court called them, had taken over the plant on May 6, 1937, and thereafter refused access to anyone, either to safeguard the plant and machinery or to make shipment of goods on hand, the bulk of which had been manufactured for out of state customers. On its part, the company refused to accede to the union demand for a closed shop. The question was thus one of law, so to speak. The district court denied redress, but on June 21, 1937, the Third Circuit Court of Appeals, Judge Davis writing the opinion, granted an injunction² and, pursuant thereto, the strikers were shortly after ousted by force.

So ended the sit-down strike. Thereafter, when the matter reached the Supreme Court on certiorari, it could do little else but remand the

* It is due to candor to state that the writer was a member of the Anti-trust Division of the Department of Justice during 1939-40. No past experience indicates a bias either particularly pro-labor or pro-business. However, a reading of some thousands of cases on commercial paper in the last twenty years has, no doubt, provided a distorted social viewpoint of one sort or another.

Italics in quotations, which have been used generously throughout the article, are generally supplied by the writer.

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1. 310 U. S. 469 (1940).

2. *Apex Hosiery Co. v. Leader*, 90 F. (2d) 155 (C. C. A. 3d, 1937).

case to the district court, as it did on December 13, 1937,³ with directions to vacate the decree and to dismiss the bill of complaint; the equity side of the case had become moot.

The question now had to do with the damages, which were very considerable. Who, according to law, should pay for the union's party? The ensuing proceedings before the district court resulted in a verdict for the company of \$237,310.85, which amount, when trebled by the trial judge as provided by the Sherman Act, brought a final judgment for \$711,932.55. But again it appeared that the district court had misread the law, or that its timing was bad, for the Circuit Court of Appeals, Judge Biggs writing the opinion, reversed the lower court's judgment and remanded the case with directions to find for the union defendants.⁴ Of course the personnel of the Circuit Court of Appeals had changed since the injunction action had been decided, if that is material. To the new court the case was quite clear, not only upon the damage question but on the earlier injunction question as well; were it necessary to do so, "we" would "overrule our decision in the former case, since, as we have shown, it was erroneous."⁵

Judge Biggs rested his decision upon two points, both insecure: "The (1) *extent* and (2) *intent* of the interference with commerce considered against the background of social consequences, must furnish the criteria for the determination of whether or not a combination and its acts are within the scope of the Sherman Act."⁶ As to the first, although the company did a business of about \$5,000,000 a year, this was but a small part of the business done by the total industry. Even if the company's output for 1937 were quadrupled, the court said, "it would amount to less than three percent of the total national output in the industry."⁷ And, no doubt as compared with world output, the ratio would have been even smaller, but the court did not go so far afield. In its opinion, on the national comparison alone, the interruption of production caused by defendants' actions had too small an effect upon interstate commerce to bring the case within the Sherman Act.

By his second point, under the word "intent," Judge Biggs sought, no doubt, to require the plaintiff to show that defendants' activities were intended to have a "direct" effect upon commerce. Should the effect be merely "incidental," or, worse still, one merely to serve a purely "local" purpose, then again the case would be taken out of the Sherman Act. For, as the Supreme Court had said long ago in *Hopkins v. United States*: "There must be some *direct* and *immediate* effect upon interstate com-

3. *Leader v. Apex Hosiery Co.*, 302 U. S. 656 (1937).

4. *Leader v. Apex Hosiery Co.*, 108 F. (2d) 71 (C. C. A. 3d, 1939).

5. *Id.* at 81.

6. *Id.* at 76.

7. *Id.* at 79.

merce in order to come within the Act."⁸ Tested by this rule, how did the case stand? Clearly the defendants did not have the requisite "intent" to restrain commerce. "On the contrary," as Judge Biggs put it, "their intent was to unionize the appellee's plant, an action local in motive and local in effect. The effect upon interstate commerce was merely indirect, incidental and remote."⁹ The opinion had all the customary words.

Somehow these time tested phrases failed to convince the company. After all, what did the court mean by "indirect, incidental, and remote" when its plant had been taken over by the strikers, its property destroyed, and its commerce brought to a standstill. Obviously the court could not mean literally what it said. But then defendants' purpose may perhaps have been "local," that is, if one forgets that organization of plaintiff's plant was probably but a part of a national campaign to organize the industry. And, moreover, why should it make any difference whether defendants' motives were "local," whatever that means. The statute fails to say anything favorable about merely local motives or, for that matter, to exempt indirect, incidental, and remote effects upon commerce.¹⁰

It may also have occurred to the company that in many cases the "no intent, indirect effect, local purpose" formula has not been used, or, if used, has brought a different result. In *United States v. Brims*,¹¹ for example, the conspiracy was the familiar one between union carpenters and local builders and mills, for mutual advantage. Being limited to the Chicago area, probably not one percent of the millwork of the country was affected, if the point is material. The restraint — stoppage of millwork shipments into Chicago — was obviously no more "direct" than the tie-up of the Apex Hosiery Co.'s outgoing business. So, what of the motive? Perhaps it was more "local" in one case than in the other. But surely no intelligent distinction can be drawn on that score, for in each case the labor defendants were actuated by self interest, sooner or later, to obtain higher wages. The business conspirators, for their part, were out to make greater profits. Their motive, too, it would seem, was wholly "local." Yet the Supreme Court was unanimous that the defendants in the *Brims* case had violated the Sherman Act.

Of course Judge Biggs made no mention of the *Brims* case in his opinion; a more inviting pathway had been marked out for him in other Supreme Court cases. In the case of *United Mine Workers v. Coronado Coal Co.*, a case circumstanced very much like the *Apex* case, Chief

8. 171 U. S. 578, 592 (1898). Many other quotations to the same effect could be cited.

9. *Leader v. Apex Hosiery Co.*, 108 F. (2d) 71, 79 (C. C. A. 3d, 1939).

10. Section 1 of the Sherman Act provides very simply that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

11. 272 U. S. 549 (1926). The case received fresh approval in the *Apex* case, 310 U. S. 469 (1940).

Justice Taft had said: "Obstruction to coal mining is not a *direct* obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce."¹² And again in *United Leather Workers' International Union v. Herkert & Meisel Trunk Co.*, a case where interstate shipment of leather goods had been tied up by strike, the Court had said: "mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an *indirect* and *remote* obstruction to that commerce."¹³ Finally, as if further sanction were needed, in *Levering & Garrigues Co. v. Morrin*, Mr. Justice Sutherland had exonerated steel workers, who had stopped the use of structural steel in New York, by pointing out that they had "a purely local aim," that is, presumably, to obtain maximum wages for themselves. "It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy."¹⁴

If one did not press the point too closely, "local aim" and "indirect effect" and all the other hocus pocus would evidently do very well. But the second *Coronado* case gave Judge Biggs some difficulty, for there the Supreme Court had held strikers liable under the Sherman Act. That case, like this one, involved a stoppage of production; both were accompanied by violence and property damage. But, happily, the key to the problem was found in time, for at the conclusion of his opinion Chief Justice Taft had made this statement: "We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines."¹⁵ There it was, as clear as crystal; obviously the defendants in the second *Coronado* case had more than a "local aim," and, it followed, though Judge Biggs refrained from saying so, that their interference with commerce was "direct," not merely "indirect, incidental, and remote."

THE NEW TEST: COMMERCIAL COMPETITION

Such was the damage case as it came to the Supreme Court, its basic issues lost in a maze of verbalism. Mr. Justice Stone, who wrote for the majority, was not disposed to spend much time on some of the points debated below. After nearly fifty years of experience with the statute,

12. 259 U. S. 344, 408 (1922).

13. 265 U. S. 457, 471 (1924).

14. 289 U. S. 103, 107 (1933).

15. *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310 (1925).

there could no longer be any doubt, he said, that it applied to labor "to some extent and in some circumstances."¹⁶ He recognized also that no test based on the amount of commerce involved could be used to limit the scope of the Act.¹⁷ Defendants, moreover, must be taken to have "intended" the natural consequences of their acts, that is, a restraint upon the company's commerce. Their action had in all conscience a sufficiently "direct" effect on that commerce, insofar as physical interference with commerce is a test. And it was not material that the interference was accompanied by violence; destruction of property or goods does not give jurisdiction under the Sherman Act, or so the Court said.¹⁸

But Mr. Justice Stone was not disposed wholly to discard the word "direct" as of significance in anti-trust cases. It could still be useful, if freely translated. What did it really mean? The answer was again found in an opinion by Chief Justice Taft, that in the *Leather Workers* case. There, by some trick of fate, the whole thing was summed up in one broad dictum: "It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture" — note carefully — "to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said *directly* to burden interstate commerce."¹⁹

According to Chief Justice Taft, and Mr. Justice Stone agreed, perhaps too willingly, any other construction of the Act would be unthinkable. Either the Act must be exactly so limited or, as the Chief Justice put it: "The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to Federal jurisdiction providing any appreciable amount of its product enters into interstate commerce."²⁰ That such a dictum is unusual requires no citation of authority; courts only rarely assume to circumscribe a statute by stating the *only possible* ways it may be violated. Moreover, it should be evident — or will become so shortly — that there are many other ways in which the statute could be construed without bringing *all* strikes within its terms.

At all events, whatever criticism may be made of Chief Justice Taft's dictum, the present Court had found an irreproachable authority for its position. When the Court in the *Leather Workers* case insisted that there must be a "direct" interference with commerce, it "was not seeking to apply a purely mechanical test of liability, but was using a shorthand expression to signify that the Sherman Act was directed only at" — watch

16. 310 U. S. 469, 487 (1940).

17. *Id.* at 485: ". . . it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation."

18. *Id.* at 484, 513.

19. 265 U. S. 457, 471 (1924).

20. *Ibid.* Mr. Justice Stone quoted this statement without qualifications at 310 U. S. 469, 510 and repeated the point at 513.

closely again — “those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as ‘to monopolize the supply, control its price or discriminate between its would-be purchasers.’ ”²¹

Of course Chief Justice Taft had said nothing whatever about “competition” in stating his final and ultimate test. Nor can his statement be fairly so construed, particularly if the Court intends further to restrict “competition” to “price competition,” as it seemed inclined to do in the *Apex* opinion.²² It may be well to recall, as Mr. Justice Holmes pointed out long ago, that the word “competition” is nowhere to be found in the Sherman Act. And it is as true now, as when Mr. Justice Holmes wrote, that:

“Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the Act. . . . The Act says nothing about competition. I stick to the exact words used.”²³

But then, the test of the pudding is in the eating. How, for example, does the second *Coronado* case fare under the proposed construction? Mr. Justice Stone adopted with full approval the distinction referred to above which had been pointed out by Judge Biggs; the union’s quarrel with the non-union mines was to prevent their product from being sold in competition with union mined coal, which would have had the effect of reducing prices and so, ultimately, of depressing wages. Likewise, in *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass’n*,²⁴ “it appeared that the purpose of the strike was to prevent the interstate sale of the stone in competition with the product of unionized producers.”²⁵ These cases, then, were rightly decided, according to the new test. Indeed, they were thought to be further authority for it, since implicit in them is recognition that only such conspiracies are actionable under the Sherman Act as have the purpose or effect of asserting — the test is again reworded — some form of “market control of a commodity, such as to ‘monopolize the supply, control its price, or discriminate between its would-be purchasers.’ ”²⁶

Somewhat earlier in the majority opinion, Mr. Justice Stone spoke with rather more discrimination concerning the objects and purposes of the present day labor combination. He there said: “Since, in order to render a labor combination effective it must eliminate the competi-

21. 310 U. S. 469, 511 (1940).

22. “Price” competition, “business” competition and just plain “competition” are used interchangeably throughout the opinion.

23. Dissenting in *Northern Securities Co. v. United States*, 193 U. S. 197, 403 (1903).

24. 274 U. S. 37 (1927).

25. 310 U. S. 469, 512 (1940).

26. *Ibid.*

tion from non-union made goods, . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. *But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.*" Very true, but how possibly can such a statement be squared with the reasons given for the Court's approval of the *Bedford* and second *Coronado* cases? And for its present decision? The elimination of "competition" or of "price competition," or, if you prefer, the assertion of "market control" involved in those cases was exactly the sort which the Court here says has *never* been prohibited by the Sherman Act.²⁷

One gets the impression from such complete inconsistency that the majority members of the Court were not all of one mind. The statement just quoted would have marked for slaughter nearly all, if not all, of the labor cases brought under the Sherman Act, had the facts in each case been fully presented. Obviously this would be going much too far; after all, the Act does apply to labor, as the Court said, "to *some* extent and in *some* circumstances."²⁸ Moreover, the irreproachable quality of the Taft dictum in the *Leather Workers* case would be somewhat dimmed, to say the least, if it were used at once to overrule the Taft decision in the second *Coronado* case. So a last minute reprieve was given.

The startling thing, though, is that the reprieve went to the other extreme and was put in terms so broad that a great many labor cases can now be brought within the Act. That is, as a matter of dialectics. Perhaps this accounts for the mixed emotions with which labor read the opinion. Labor could see that, if the concluding part of Mr. Justice Stone's opinion were to control, many future complaints and indictments could and would be brought against it. All that would be necessary would be to allege a purpose to eliminate "competition" between union and non-union goods, or to "control the market" to that end, in order to make out a case. That being "the objective of any national labor organization," as the Court well said, it follows that nearly all union activities affecting interstate commerce may be subject to prosecution. That is, unless perhaps Mr. Justice Stone spoke with his tongue in his cheek. It may be the court was merely putting an insecure foundation under the few labor cases it had said were still within the Act, so that they too might be pushed out at some later date. Whatever one may think of such a maneuver it still will not do to reverse too many cases on a single day. All in all, a pretty kettle of fish, however you may care to look at it.

27. For an able discussion of the *Apex* case in the light of this evident confusion on the part of the Court, see Gregory, *The Sherman Act v. Labor* (1941) 8 U. OF CHI. L. REV. 222.

28. See p. 791 *supra*.

THE BAD TRUST-GOOD LABOR PHILOSOPHY

So, we have another illustration of the old adage that hard cases make bad law. But the generation which gave currency to that saying was often distressed by mere verbal inconsistencies. And one must probe below the mere wording of the opinion in the *Apex* case to say whether it made essentially good law or bad; such skill as the Court displayed at phrase matching alone is not very material. It is that law which consists of the philosophy and underlying purposes disclosed by the Court, the body and substance of the opinion, which is significant. That this law of the Sherman Act is a different thing today in the hands of the present Court than it was in the recent past is only too evident, however careful the Court was to clothe its opinion in the *Apex* case in the words of Chief Justice Taft. In fact the point is clearer, if anything, because of the evident pleasure the Court took in dressing out the decision as it did.

Throughout, the opinion is studded with phrases suggesting that the Court has in mind, as occasion offers, to restrict the statute solely to big business combinations. It is pointed out that the statute was enacted in an era of "trusts" and of "combinations."²⁹ The legislative history of the Act, it seems, is "emphatic" in its support of the conclusion that "business competition" was the problem considered by Congress.³⁰ The Act sought to strike at those restraints of trade "which had a significant effect on such competition."³¹ To that end it wrote into the federal system the "well understood"³² common law of trade restraints: "In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce."³³ On the other hand, it is stated over and over again in the opinion that the Act was not designed to "police" transportation;³⁴ that the Court has never applied it to mere "local" strikes;³⁵ indeed, it would disturb that nice balance "between state and national governments of police authority," a matter of "far-reaching importance,"³⁶ unless the Court were to adopt a hands-off construction of the statute as applied to labor.

29. 310 U. S. 469, 492 (1940).

30. *Id.* at 493, n. 15.

31. *Ibid.*

32. *Id.* at 494, 497.

33. *Id.* at 497-8.

34. *Id.* at 487, 490, 512.

35. *Id.* at 496-7. Unless it could be "shown that the restrictions on shipments had operated to restrain *commercial competition* in some substantial way."

36. *Id.* at 513: "An intention to disturb the balance is not lightly to be imputed to Congress."

The basic philosophy of the present Court is thus clear enough; it is concerned with commodities, prices, and free business competition and only reluctantly, if at all, with services, wages, and labor combinations in restraint of trade.³⁷ So far so good. But in evaluating such a policy it must be remembered that the Court is construing a statute. In a democratic system it is the Court's function — more or less scrupulously — to do the legislative bidding, be it good or bad, rather than to carry out its own bias in favor of one view or another. Nor is it any concern of the Court what cases are prosecuted under the statute. Probably no member of the Court more fully appreciates this than Mr. Justice Stone.³⁸ It will be assumed, therefore, in what follows that the question is simply whether the majority has read rightly what Congress meant, and now means, by the Sherman Act.

SENATOR SHERMAN AND "INDUSTRIAL LIBERTY"

Senator Sherman appears to have been primarily concerned, as Mr. Justice Stone says, with the business "combination," or "trust," of his day. The bill which he reported to the Senate on March 18, 1890, was in the form of an amendment to a prior bill which was "to declare unlawful trusts and combinations in restraint of trade and production."³⁹ The text of the bill was limited to those "arrangements, contracts, agreements, trusts or combinations" only which would tend "to prevent full and free competition" in goods, or which would tend "to advance the cost to the consumer." These combinations were "declared to be against public policy, unlawful, and void." No criminal penalty was proposed, although the committee had considered and rejected the suggestion that a violation of the Act should constitute a misdemeanor. It was, however, provided that any person injured by such a combination might recover "in any court of the United States of competent jurisdiction" an amount equal to "twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee."

37. The word "services" does creep in, as at 498, where, in speaking of the purpose of the legislators in drafting the Act, the Court says: "They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or *services*, which were characteristic of restraints deemed illegal at common law . . ."

38. See his great dissenting opinion in *United States v. Butler*, 297 U. S. 1, 87 (1936), in which he says: "Courts are not the only agency of government that must be assumed to have capacity to govern."

39. Several similar bills, some much more drastic than that proposed by Senator Sherman, appear to have been introduced in this and preceding sessions of Congress. For a general discussion of their applicability to labor see MASON, *ORGANIZED LABOR AND THE LAW* (1925).

The several ensuing debates leave no question of the intent and purpose of Senator Sherman's bill. The country had become alarmed at the great dangers, real or supposed, which were taken to be inherent in large combinations, particularly of capital. The fear was not so much that prices would become higher, by the elimination of price competition, but the much deeper fear, as Senator Sherman said in introducing his bill, that men might be deprived of their right "to work, labor, and produce in any lawful vocation."⁴⁰ Senator Sherman's bill—though poorly drawn for the purpose—was in his opinion to save consumer, workman, and small businessman from the sinister power of the large combination, that is, to make secure the "industrial liberty of the citizens." And it was to do this, moreover, by *supplementing* "the enforcement of the established rules of the common and statute law by the courts of the several States."⁴¹

The three decades prior to the introduction of the bill had witnessed the birth and growth of national labor organizations and a series of aggressive and violent strikes. When Senator Sherman's bill came before the Committee of the Whole, labor was well represented; there followed several extended discussions with reference to the application of the bill to labor organizations. Senators Hiscock, George, Tellar, Stewart, and Hoar were of the opinion that the bill would interfere not only with labor, but with farmers' organizations as well. For example, on March 25, 1890, Senator Stewart said:

"Again, suppose that the employers, railroad companies, and manufacturing establishments should say that labor shall be put down to two bits a day. Suppose that capital should combine against labor, as it is very much inclined to do, and there should be a combination among the laborers which would increase the cost of production and increase the cost of the articles consumed. Suppose there should be a combination among the laborers to protect themselves from grasping monopolies; they would all be criminals for doing it."⁴²

Consequently, Senator Sherman introduced a proviso to Section 1 of the bill. The proviso was taken from an amendment offered by Senator George and read as follows:

"Provided, that this Act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or of increasing their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products."

40. 21 CONG. REC. 2457 (1890).

41. *Ibid.*

42. *Id.* at 2606.

In offering this proviso Senator Sherman said: "I do not think it necessary, but, at the same time to avoid any confusion, I submit it to come in at the end of the first section."⁴³ The proviso was adopted as an amendment. It did not, it will be noted, purport *wholly* to exempt labor from the bill, but only certain objectives of labor: those which cannot well be removed from the area of conflict, and so must be left to a process of bargaining.

Even so, on March 27, 1890, Senator Edmunds spoke in vigorous opposition to the proviso which had been appended to Section 1 of the bill. Senator Edmunds' view was that it was economically impractical to permit combinations on one economic plane while prohibiting them on another. The proviso would not even serve labor, for labor might well say:

"When you allowed us to combine and to regulate our wages, why did you not allow the products that our hands produced to be raised in price by an arrangement, so that everybody that bought them might pay the increased price, and everybody that was making them all around for whom we were working could live also?" I do not think, as a practical thing, Mr. President, that anybody will thank us for making a distinction like that."⁴⁴

After this debate and on the same day, March 27, 1890, the bill, including the labor proviso, was referred to the Committee on the Judiciary, of which Senator Edmunds was chairman. This course had been twice before defeated because of the supposed hostility of the Judiciary Committee. At all events, the thing was done and, on April 2, 1890, a wholly new bill, in substantially the present form of the Act, was reported back. Not only had the labor proviso been stricken by the Committee; the whole new bill read very differently from the one proposed by Senator Sherman.

SENATOR HOAR AND "COMMON LAW PRINCIPLES"

The important thing about the new bill—the present Act—is that it had been so greatly broadened. It was no longer directed primarily at "trusts," as was Senator Sherman's bill, but at "Every contract, combination in the form of trust or otherwise, or conspiracy." A new and separate section dealt with monopolies, which had not even been mentioned by Senator Sherman. The new title was: "An act to protect trade and commerce against unlawful restraints and monopolies," rather than merely "to declare unlawful trusts and combinations in restraint of trade and production." The bill was no longer limited to "articles of growth, production or manufacture," but dealt generally with "trade or commerce

43. *Id.* at 2611.

44. *Id.* at 2729.

among the several states." It no longer made mention of "full and free competition" or of arrangements which "tend to advance the cost to the consumer," but used a much broader phrase: "in restraint of trade or commerce."

The bill as so drawn was apparently satisfactory to the Senators who had spoken in favor of labor, for no further attempt was made to exempt legitimate union activities. Indeed the bill is generally supposed to have been drawn by Senator Hoar,⁴⁵ and he had favored a *limited* exemption; it was eminently satisfactory to him. It was also, "except for one section," not mentioned, satisfactory to Senator Edmunds, Chairman of the Committee on the Judiciary, who supported the measure. There is no record of what transpired during the committee hearings, but *there was no further debate of consequence either in the Senate or in the House*. The only fair conclusion to be drawn, therefore, is that labor, like any other group in society was to be subject to the Act, if its actions were in "restraint of trade."⁴⁶

The essential facts in this brief recital of the legislative history of the Hoar (Sherman) Act are well known to the present members of the Court. The fact is "that the bill which was arduously debated was never passed, and that the bill which was passed was never really discussed."⁴⁷ It is difficult to understand, therefore, why Mr. Justice Stone should quote at such length from the debates on the early bills before Congress,⁴⁸ which admittedly were limited to "trusts," "commodities," "prices" and "competition." Not even the overzealous advocate would offer such evidence as "emphatic" support for the suggestion that the greatly changed bill finally passed was *limited* to such matters.

While looking at legislative history, incidentally, let us see what light it throws on the Court's further intimation that its construction of the statute was necessary in order not to trespass on the police powers of the states.⁴⁹ In the first place, as noted above, Senator Sherman had no such idea; his bill was to permit the federal courts to "supplement" the work of the state courts. Or, as he put the matter in speaking of the more limited bill which he had introduced:

"It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but *applies*

45. WALKER, HISTORY OF THE SHERMAN LAW (1910) 27-28 accredits the drafting of the present Act to Senator Hoar.

46. See MASON, ORGANIZED LABOR AND THE LAW (1925) 121 *et seq.*; Emery, *Labor Organizations and the Sherman Act* (1912) 20 J. POL. ECON. 599. *Contra*: BERMAN, LABOR AND THE SHERMAN ACT (1930) 3 *et seq.*; Boudin, *The Sherman Act and Labor Disputes* (1939) 39 COL. L. REV. 1283, (1940) 40 COL. L. REV. 14.

47. HAMILTON & TILL, ANTITRUST IN ACTION (TNEC Monograph No. 16, 1940) 11.

48. 310 U. S. 469, 493-4, n. 15 (1940).

49. *Id.* at 513.

*old and well recognized principles of the common law to the complicated jurisdictions of our State and Federal Governments."*⁵⁰

Here was no suggestion that labor restraints upon trade were a state matter and for the state courts alone to handle. The same set of facts, of course, may and often does constitute two offenses, one state, the other federal. Nor has the Supreme Court, heretofore, been particularly solicitous of state jurisdiction when in conflict with federal action under the commerce clause.⁵¹

The brief debate on April 8, 1890, when the bill which became the present Act was passed by the Senate with but one dissenting vote, was even more explicit on what the Act was supposed to achieve. According to Senator Hoar, and there is no better authority, it was designed to bring over into federal jurisprudence the whole framework of common law principles dealing with restraints upon trade, that is, wherever interstate commerce was affected. He stated the case this way:

"The common law in the States of the Union of course extends over citizens and subjects over which the State itself has jurisdiction. Now we are dealing with an offense against interstate or international commerce, which the State can not regulate by penal enactment, and we find the United States without any common law. *The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.*"⁵²

Of course Senator Hoar lived in the not distant past when people put their faith in "common-law principles," as things immortal. Some people even now regard such a principle as a thread of thought, or perhaps

50. 21 CONG. REC. 2456 (1890).

51. Mr. Justice Stone cites the principal cases to refute his argument at 310 U. S. 469, 484 (1940). An additional authority is *Stafford v. Wallace*, 258 U. S. 495, 520 (1923) where the Court said: "The reasonable fear by Congress that such acts, usually lawful and affecting only intrastate commerce when considered alone, will probably and more or less constantly be used in conspiracies against interstate commerce or constitute a direct and undue burden on it, expressed in this remedial legislation, serves the same purpose as the intent charged in the Swift indictment to bring acts of a similar character into the current of interstate commerce for federal restraint." But the Sherman and Clayton Acts apply also—and more obviously one would think—when the intrastate acts are themselves unlawful in some respect. As stated by the Court in *Duplex Co. v. Deering*, 254 U. S. 443, 466 (1921): "Those acts, passed in the exercise of the power of Congress to regulate commerce among the States, are of paramount authority, and their prohibitions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes." In other words the Congress intended that its statute should be given effect to the utmost reaches marked out by the phrase "in restraint of trade or commerce," state law in accord or to the contrary notwithstanding.

52. 21 CONG. REC. 3152 (1890).

several strands — now evidenced by statute, perhaps later lost for a time or showing only in a course of dealing, again redeclared by some court — and, though reaching back into early times in England, extending on down to the present. Senator Edmunds spoke to the same point, but somewhat more realistically; the bill, it was true, was made “out of terms that were well known to the law already,” something particularly appropriate in “a new line of legislation,” but it was for the courts “in the first instance to say how far they could carry it” as particular cases might arise.⁵³ Senator Edmunds was familiar with the “terms” of the bill, but not quite so sure of the “common-law principles”; he put his faith in the courts — “in the first instance” — to declare them.

THE COMMON LAW PRECEDENTS

Mr. Justice Stone agreed readily enough that the scope of the Act was set by the common law doctrines Congress had in mind.⁵⁴ Indeed, they “were well understood,”⁵⁵ and had been since long before the statute was drafted.⁵⁶ They had to do, in fact, with “contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices.”⁵⁷ In other words they had to do with goods and prices and not much else. Senator Sherman, it seems, had cited to Congress a list of cases which had to do with just such matters.⁵⁸ Again it was not mentioned that Senator Sherman’s bill, unlike the present Act, was expressly limited to business combinations. So it followed that the present Act was designed merely to assure to “buyers or consumers the advantages which accrue to them from free competition in the market.” But the protection, at common law at least, was slight, for, while such contracts were “unenforceable,” they “were not penalized and gave rise to no actionable wrong.”⁵⁹ And that was all; no common law authorities were cited; the matter was really too well understood to admit of discussion.

Which prompts the question: what actually were the precedents which Senator Hoar meant to weave into the Sherman Act?⁶⁰ It is not possible

53. 21 CONG. REC. 3148 (1890).

54. 310 U. S. 469, 498 (1940): “. . . the restraints at which the Sherman law is aimed, and which are described by its terms, are *only* those which are comparable to restraints deemed illegal at common law . . .”

55. *Id.* at 494.

56. *Id.* at 497.

57. *Ibid.*

58. *Id.* at 497, n. 17.

59. *Id.* at 497.

60. For a discussion of sorts on this question, written from a pro-labor viewpoint, see Boudin, *The Sherman Act and Labor Disputes* (1939) 39 COL. L. REV. 1283, (1940) 40 COL. L. REV. 14.

in the space at hand to give more than a brief outline. But, even so, it can be said, "emphatically," that our heritage was by no means so slender as Mr. Justice Stone made it appear. Evidently Senator Hoar, in the few days he took to draft his bill, merely canvassed the several familiar headings under which restraints of trade had figured in the golden past and brought them into the statute. Whether they had to do with "contracts," or "combinations," or "conspiracies," they all stemmed, in his view, from the same basic principles for the protection of trade. So with "monopolies." And although Senator Hoar no doubt knew full well that certain of the old sanctions were feeble, or in some cases had lapsed entirely, it was not his purpose to take over a dying system; it was exactly the opposite: to create a living federal law concerning trade restraints. To that end, therefore, the statute was fitted out with a full set of teeth, with all the *old* teeth, in fact, which had at one time or another functioned in the past.

Such was the plan of the statute. It brought together the law at one or another time current in the equity courts, where an injunction was the remedy sought, in the law courts, when damages were in issue, and in the criminal courts, when criminal sanctions were being asked for. All were means to the same end, the protection of trade. From which it follows that, if one wants a full understanding of those "common-law principles" which Senator Hoar had in mind or of the kind of "trade" which he wanted to protect, the best available statements are to be found in the reports. The statute was by no means so "vague" as Mr. Justice Stone would have it,⁶¹ but it was intended to be very *general*.

THE BUSINESS COMBINATION CASES

The handful of cases which Senator Sherman produced before Congress, with perhaps one exception, had to do with business combinations designed to eliminate competitors and to fix prices; the so-called "trusts" of the day. They merely declared such combinations, and the contracts by which they were brought about, to be unlawful, in the sense that they were unenforceable. No criminal penalty was applied, nor did Senator Sherman favor one. And as for the "common-law principles" on which the courts acted, they were no more precise than the words "public policy" would imply. For example, in *Richardson v. Alger*, one of the Diamond Match Co. cases, the court held a combination agreement void, Sherwood, C. J., saying:

"Monopoly in trade or in any kind of business in this country is odious to our form of government. . . . It is alike destructive to both individual enterprise and individual prosperity . . . and there-

61. 310 U. S. 469, 489 (1940): "In consequence of the *vagueness* of its language, perhaps not uncalculated, the courts have been left to give content to the statute . . ."

fore public policy is, and ought to be, as well as public sentiment, against it."⁶²

Craft et al. v. McConoughy, also discussed by Senator Sherman, went back to an earlier line of cases where the exact phrase, "restraint of trade," is mentioned, but the court again rested the decision on grounds of public policy. The case involved a combination of grain dealers who had agreed to fix local prices. The action was a bill for an accounting brought by one of the parties. In denying recovery the court said:

"That the effect of this contract was *to restrain the trade and commerce* of the country, is a proposition that cannot be successfully denied.

"We understand it to be a well settled rule of law, that an agreement *in general restraint of trade, is contrary to public policy*, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable."⁶³

The court cited as its authorities the early restrictive covenant cases of *Mitchell v. Reynolds*,⁶⁴ and *Horner v. Graves*.⁶⁵

COVENANTS NOT TO COMPETE

Senator Sherman could have cited other *business combination* cases, decided within the preceding half century, which had reached the same result. Many of these were later reviewed by Judge Taft in *United States v. Addyston Pipe & Steel Co.* But while these were important applications of the "restraint of trade" doctrine, they were by no means the only ones, as Judge, later Chief Justice, Taft recognized. He too cited the cases dealing with individual contracts or covenants in restraint of trade as perhaps best illustrating the social and economic preconceptions underlying the doctrine written into federal law by the Sherman Act.

Judge Taft's summary of the early law, based in part on the leading case of *Mitchell v. Reynolds* is instructive:

"From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and

62. 77 Mich. 632, 658 (1889).

63. 79 Ill. 346, 349 (1875).

64. 1 P. Wms. 181 (Ch. 1711).

65. 7 Bing. 735, 743 (C. P. 1831).

deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others."⁶⁶

The case of *Alger v. Thacher*, where the reasons are stated more fully, was also cited with approval. The court there said:

"The unreasonableness of contracts in restraint of trade and business, is very apparent from several obvious considerations. (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. . . . (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void."⁶⁷

The first two of these reasons are particularly related to the problem of present day labor restraints. It is true that Judge Taft stressed particularly the fourth and fifth considerations mentioned in *Alger v. Thacher*. As he put it, "The changed conditions under which men had ceased to be so entirely dependent for a livelihood on pursuing one trade, have rendered the first and second considerations stated above less important to the community than they were in the seventeenth and eighteenth centuries," while the fourth and fifth considerations "have certainly lost nothing in weight in the present day."⁶⁸ But though regarded by the court as *less important* — especially since the *Addyston Pipe* case was a business combination case — they were by no means thought to be of *no* consequence in 1898. Indeed the exact opposite was true.

THE MONOPOLY PRECEDENTS

Undoubtedly, however, Senator Hoar reached even further back than the cases discussed above for some of the common law precedents upon which the Sherman Act is based. Section 2, it will be recalled, is expressly directed at "monopolies," which have had a long career in

66. 85 Fed. 271, 279 (C. C. A. 6th, 1898).

67. 19 Pick. 51 (Mass. 1837).

68. 85 Fed. 271, 280 (C. C. A. 6th, 1898).

English law. It is not proposed to review this history now for it has already been done by Chief Justice White in *Standard Oil Co. v. United States*.⁶⁹ But it should be noted that the sixteenth century in England witnessed two important Parliamentary efforts to regulate trade. One was the statute of 1552 making "forestalling," "regrating," and "engrossing" offenses punishable by fine and imprisonment as misdemeanors.⁷⁰ While this statute had long since fallen into disuse by the time it was repealed in 1772, it nonetheless contributed greatly to lay the ground work for the court-made law concerning restraint of trade. Passed in a society organized on a rationing basis, it survived into a competitive society as a guide to the courts to insure that the values which it was designed to protect should not be entirely destroyed.

The other legislation had to do with the craft guilds. Having power to determine as they chose, who might work and who might not, the quality and kind of things to be produced, the supply and the price, the guilds aroused such great opposition that many statutes directed at them were passed during the sixteenth century until their power was finally broken. Then followed the monopoly established by royal grant. The question of its legality according to "common-law principles" was finally brought before the courts in the case of *Darcy v. Allein*,⁷¹ more familiarly known as the Case of Monopolies. The court found that plaintiff's purported monopoly of the sole right to make playing cards within the realm was against the common law and void.

Two reasons were given for this decision: first, that a monopoly of "the sole trade of any mechanical artifice" is "a damage and prejudice to those who exercise the same trade"; or, as stated more fully later in the opinion, such monopolies tend "to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary." The other reason was the now more familiar one that with monopolies "the price of the same commodity will be raised" and the commodity will not be "so good and merchantable as it was before: for the patentee having the sole trade, regards only his private benefit, and not the common wealth."

Finally, in 1623, the Statute of Monopolies was passed, declaring generally that all grants of monopoly by the Crown, except patent monopolies, were contrary to law.⁷² The remedy provided in favor of any person who might be "hindered, grieved, disturbed, or disquieted" thereby was that now found in the Sherman Act, Section 7, that is, a right to "recover

69. 221 U. S. 1 (1911).

70. 5 & 6 EDW. VI, c. 14 (1552), repealed 12 GEO. III, c. 71 (1772).

71. 11 COKE 84 b (K. B. 1603).

72. 21 JAC. 1, c. 3 (1623).

three times as much as the damages which he or they sustained by means or occasion of being so hindered, grieved, disturbed or disquieted." This statute, and the reasons for its passage, unquestionably also contributed much to the subsequent law concerning restraints upon trade. Prominent among these, as had earlier been stated by the court in the case of the *Tailors of Ipswich*, was the thought that no man should be prevented from working at his occupation, or, as the court put it, "at common law no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil . . . and the common law abhors all monopolies, which prohibit any from working in any lawful trade."⁷³

THE CONSPIRACY CASES

It remains to consider one other line of common law precedent which was woven into the Sherman Act, that connoted by the use of the word "conspiracy." The cases involving "contracts" in restraint of trade, as above noticed, had to do only with the question of enforceability. And, while business "combinations" in restraint of trade were no doubt once indictable, criminal actions against them were very seldom brought, if at all, at the time the Sherman Act was drafted.⁷⁴ The criminal remedy was used principally in the case of labor "conspiracies" in restraint of trade. In fact the case of *Callan v. Wilson*, decided by the Supreme Court in 1887, only shortly before the adoption of the Sherman Act, had to do with a police court conviction in a labor conspiracy in the District of Columbia.⁷⁵ Probably the use was even wider than appears, as undoubtedly many labor prosecutions never reached the reports in the higher courts at all.

There was considerable question in England whether a criminal penalty was applicable to labor conspiracies as being in restraint of trade at common law or only when provided by statute. Though the point is not essential to the present purpose, since either statute or common law could serve as precedent for the Sherman Act, the cases are illustrative of the kind of activities at which the criminal remedy was directed. The early case of *R. v. Cambridge Journeymen-Tailors*, held that a combination to refuse to work for less than a certain sum was an indictable conspiracy at common law, so that the indictment need not conclude *contra formam statuti*.⁷⁶ And in 1783 the case of *The King v. Eccles and Others* held that a conspiracy to prevent a man from carrying on his trade was a criminal offense. In this case Lord Mansfield, C. J., said: "The con-

73. 11 Coke 53 a (K. B. 1614).

74. See generally, *State v. Eastern Coal Co.*, 29 R. I. 254, 70 Atl. 1 (1903).

75. 127 U. S. 540 (1888).

76. 8 Mod. 10 (K. B. 1721).

spiracy is to prevent Booth from working, the consequence is poverty," and he accordingly refused the motion in arrest of judgment.⁷⁷

In 1855, in the case of *Hilton v. Eckersley*, Crompton, J., made a broad statement upon the point, to this effect:

"I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture. The precedents of indictments for combinations of two or more persons to raise wages, and for other offenses of this nature, which were all framed in the common law and not under any of the statutes on the subject, sufficiently show what the common law was in this respect. . . . Combinations of this nature, whether on the part of workmen to increase, or of masters to lower, wages were equally illegal."⁷⁸

The *Hilton* case involved a combination of manufacturers who had agreed to follow a common course in fixing wages, hours and work conditions in their businesses. The court held the combination to be in restraint of trade and that a penal bond given by one of the parties was accordingly void. Lord Campbell, C. J., denied that the combination would have been indictable as a conspiracy at common law, though once clearly so by statute, and this view now has the approval of the House of Lords.⁷⁹

In this country much the same uncertainty prevailed. It is clear, however, that in the early part of the nineteenth century labor organizations were widely prosecuted for conspiracy. Most of the cases are unreported but certain records have been collected by Gilmore and Witte.⁸⁰ One of the most widely discussed, the *Philadelphia Cordwainers' Case*,⁸¹ is commented on by Cheyney, in *Decisions of the Court in Conspiracy and Boycott Cases*,⁸² published in 1889, the year before the Sherman Act was passed. That case had to do with a strike for higher wages. Cheyney attributes the following statement to the recorder:

"Is there any man who can calculate, if this is tolerated, at what price he may safely contract to deliver articles for which he may receive orders, if he is to be regulated by the journeymen in an arbitrary jump from one price to another? . . . *This tends to destroy the trade of the city.*"⁸³

77. 3 Doug. 337, 339 (K. B. 1783).

78. 6 El. & Bl. 47, 52-53 (Q. B. 1855).

79. *Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A. C. 25.

80. A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (1910). And see cases listed in appendix to Nelles, *Commonwealth v. Hunt* (1932) 32 COL. L. REV. 1128.

81. 3 Doc. Hist. 59 (1805-6).

82. (1889) 4 POL. SCI. Q. 261.

83. *Id.* at 265. For an excellent discussion of this case see Nelles, *The First American Labor Case* (1931) 41 YALE L. J. 165.

An early Pennsylvania case before Judge Gibson, *Commonwealth v. Carlisle*, had to do with a reverse situation, a combination of master ladies shoemakers to reduce wages. The court said:

"I take it, then, a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be, if there was no recurrence to artificial means by either side, is criminal."⁸⁴

The great case of *Commonwealth v. Hunt* presented the question whether a union, which refused to work for an employer who employed non-union men, could be prosecuted for conspiracy. Among other counts it was charged that defendants' activities would result in bankrupting certain employers. There was no charge that defendants had demanded a raise in wages. On these facts, after careful consideration, Chief Justice Shaw held that the indictment did not charge a criminal conspiracy. The circumstance that the object of defendants' combination might have "a tendency to impoverish another, that is, to diminish his gains and profits" was not subject to question, providing "it is to be carried into effect by *fair* or *honorable* and *lawful* means."⁸⁵

But this was an advanced position and by no means settled the question. As late as 1887 the court in *State v. Stewart*, affirmed a judgment overruling a demurrer to an indictment for conspiracy in a labor case. Defendants were charged with trying to organize the employer's granite works by intimidating non-union men and calling them "scabs." Judge Powers stated ruggedly individualistic views as follows:

"The principle upon which the cases, English and American, proceed, is, that every man has the right to employ his talents, industry and capital as he pleases, free from dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. . . . While such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay a basis for an indictment on the ground that the State itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The good order, peace and general prosperity of the State are directly involved in the question."⁸⁶

84. Brightley's Rep. (Pa. 1821) 36, 40-41.

85. 45 Mass. 111, 134 (1842).

86. 59 Vt. 273, 289 (1887).

The boycott was a fairly new device when the Sherman Act was drafted. In general it had not progressed much beyond the primary stage. Members of striking unions had occasionally withdrawn their patronage from the employer, had influenced their friends to do likewise, and had even gone so far as to try to persuade other businesses to quit dealing with the employer, but they had not yet commenced to put much pressure on these businesses — the so-called secondary boycott. In *Baughman Bros. v. Askew*, however, which was a tort action for damages, the defendant union went so far as to notify the customers of the employer by circular that it would publish a list of all those who refused to withdraw their patronage. In fact the declaration charged threats and intimidation by defendants' use of the word "boycott." While Judge Welford had some doubts on the point, he nevertheless overruled the defendants' demurrer.⁸⁷

During the same year, 1887, there were several other "boycott" cases. The case of *Old Dominion Steam-Ship Co. v. McKenna*,⁸⁸ also involved a tort action and was disposed of summarily, with the same result as in the *Baughman Bros.* case. In *State v. Glidden*, however, the union members were prosecuted criminally for conspiracy. The union demand was for recognition. In finding the information sufficient on appeal after verdict of guilty, the Connecticut court said:

"Neither do we overlook the character and magnitude of this conspiracy, as evidenced by the wholesale boycotting contemplated of the patrons of the Carrington Publishing Company. Perhaps no new or different principle applies to this part of the case. We cannot forbear remarking however that it evinces a recklessness and disregard of the rights of others seldom witnessed in business affairs. Assuming, as we do, that these defendants are honest, well-meaning men, it is difficult for us to understand how they could be willing to involve the innocent patrons of The Carrington Publishing Company in embarrassment and possible ruin merely for the purpose of furthering their cause in a controversy in which these patrons were not concerned."⁸⁹

THE ACT GOES TO THE COURTS

Even so brief a review of common law authorities can leave little doubt of what common law Congress had in mind, however vaguely, when it adopted the Sherman Act. The outcry against the business trust no doubt supplied the impetus, the drive, needed to pass the law. And, as Mr. Justice Holmes once said: "There is a natural inclination to assume that it was directed against certain great combinations and to

87. 11 Va. L. J. 196 (1887).

88. 30 Fed. 48 (C. C. S. D. N. Y. 1887).

89. 55 Conn. 46, 76 (1887).

read it in that light." But, as he further said: "It does not say so."⁹⁰ The "trust" was merely a recent phenomenon; the Act was directed at it, yes, but at a great many other things as well. The Act no doubt was to "police" the market place and insure "price competition" in the sale of commodities; but there is *nothing* in its wording, or in the long history of the "well understood" but sometimes disregarded "common-law principles" it adopted, to say that it was to be so limited. The Act no doubt was to protect the consumer from unfair prices; but it was also to protect the small business man, the workman and anyone who was being crowded off the stage by a "too fierce competition," from whatever source.

So far so good. But, as Senator Edmunds pointed out, it was now a matter for the courts, "in the first instance," to give scope and direction to the statute. One of the first Sherman Act cases was that of *United States v. Workingmen's Amalgamated Council*, an action for an injunction. Defendants represented most of organized labor in the city of New Orleans. The dispute was similar to that in the *Apex* case, that is to say, the unions were determined to compel the employers to grant them recognition. To accomplish their purpose, instead of inaugurating a sit-down strike, defendants called a general strike to tie up all commerce and business in the city. While Judge Billings granted that the unions before him were "in their origin and purposes innocent and lawful," he nevertheless thought that they were not entitled to go to such lengths in gaining their ends. Their actions were said to be "in restraint of commerce" and were enjoined.

To the contention that the Sherman Act was not intended to cover such restraints, but only those of "capitalists," the court made the following statement:

"I think the congressional debates show that the statute had its origin in the evils of massed capital; but, when the congress came to formulating the prohibition which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: 'Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.' The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is mani-

90. *Northern Securities Co. v. United States*, 193 U. S. 197, 400, 402 (1904).

fest, and that it includes combinations which are composed of laborers acting in the interest of laborers."⁹¹

The next case, that of *United States v. Debs*, grew out of a similar demand for union recognition. The officers and members of the American Railway Union, in order to gain their demands, had engaged in a conspiracy to boycott Pullman cars, and in furtherance of their design had resorted to violence. A federal district court granted an injunction on the ground that the defendants had restrained interstate commerce contrary to the Sherman Act.⁹² The injunction being disobeyed, contempt proceedings were instituted, and the case finally reached the Supreme Court on a petition for *habeas corpus*. There the Court put the case on a "broader ground," but it did not "dissent from the conclusions" of the lower courts as to the scope of the Sherman Act.⁹³

These cases, it will be noted, were decided within a very few years after the adoption of the Sherman Act. The courts of that time, obviously, were in at least as good a position to interpret the Act against the background of conditions which actually gave rise to it as Mr. Justice Stone and his colleagues. At all events, in 1907, when the next important labor case, *Loewe v. Lawlor*,⁹⁴ came before the Supreme Court, both the *Debs* case and the *Workingmen's Amalgamated Council* case were approved without question by a unanimous Court. So also in the second case, *Lawlor v. Loewe*,⁹⁵ in which Mr. Justice Holmes wrote for the Court, there was again no dissent.

The case of *Loewe v. Lawlor*, as presented to the Court, had nothing to do with competition, whether "business," "price," or any other sort. The union's purpose was to organize plaintiff's plant, and ultimately the whole hat industry. The means adopted were to bring plaintiff's plant to a standstill by strike and to disrupt his trade by boycotting his hats and the dealers in such hats, wherever they were being sold. No reference was made in the opinion to the wages which plaintiff paid. The gist of the complaint, therefore, was first that plaintiff and his employees were being prevented from carrying on their business as they saw fit and secondly that the independent businesses of many dealers were being interfered with, all with the result that the public was being deprived

91. 54 Fed. 994 (C. C. E. D. La. 1893).

92. *United States v. Debs*, 64 Fed. 724 (C. C. N. D. Ill. 1894).

93. *In re Debs*, 158 U. S. 564, 600 (1895). The majority opinion in the *Apex* case, 310 U. S. 469, 486 (1940), puts this case to one side with the remark that the court there "declined to consider whether the stoppage of trains on an interstate railroad resulting from strike was a violation of the Sherman Act . . ." Mr. Justice Stone then intimates that, because other statutes specifically directed to transportation have been adopted, the Sherman Act probably never applied. The first point does not fairly state the case; the second need not be noticed.

94. 208 U. S. 274 (1907).

95. 235 U. S. 522 (1915).

of its hats. Accordingly, the defendants were required to pay triple damages under Section 7 of the Sherman Act.

The point which disturbed the court most, however, was the great power which the union, then numbering some 9,000 persons, could wield for good or ill, unless some limits were put upon its activities. Chief Justice Fuller stated the text of his opinion in two simple sentences:

"In our opinion, the combination described in the declaration is a combination 'in restraint of trade or commerce among the several States,' in the sense in which those words are used in the act, and the action [for triple damages] can be maintained accordingly. And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which (1) essentially obstructs the free flow of commerce between the States, or (2) restricts, in that regard, the liberty of a trader to engage in business."⁹⁶

This was uncompromising language. But no one who has examined—even briefly—into the long play of forces which came to focus in the Sherman Act can doubt that, on the facts before it, Chief Justice Fuller's Court acted well within the Congressional purpose. The point made by Mr. Justice Stone and his colleagues that defendants' action was "held to offend against the Sherman Act because it effected and was aimed at suppression of competition with union made goods in the interstate market"⁹⁷ was plainly never considered by the Court. It was not mentioned in the complaint. In that regard the case is on all fours with the *Apex* case. The opinion rested first on the ancient requirement—as old at least as the forestalling statutes⁹⁸—that no combination should be permitted for its own purposes and against the public welfare to obstruct the free flow of goods, even hats, to market. The other ground, the right of a trader, be he manufacturer or dealer or workman, to go about his affairs free from unwarranted compulsion, is fully as well established in common-law principles.⁹⁹ Whether the Act was designed to "police" strikes, or to "police" transportation, is beside the point;

96. 208 U. S. 274, 292-293 (1907).

97. 310 U. S. 469, 507 (1940).

98. According to Blackstone: "The offence of forestalling the market is also an offence against public trade. This, which (as well as the two following) is also an offence at common law, was described by statute five and six Edw. VI c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market; *or dissuading persons from bringing their goods or provisions there*; or persuading them to enhance the price when there: any of which practices make the market dearer to the fair trader." 4 BL. COMM. *158.

99. Mr. Justice Field, dissenting in the *Slaughter House* cases, 16 Wall. 36, 105 (U. S. 1872), stated it this way: "When the colonies separated from the mother country no privilege was more fully recognized" than that of the individual to follow "any of the known established trades or occupations of the country."

it most certainly was adopted to "police" trade and commerce, if that is the word to use.

But the language of *Loewe v. Lawlor* held many forebodings for the future. As might be expected, the decision was seriously criticized by organized labor. It must be remembered, however, that labor had by no means yet won its fight for recognition, that is, for the right to bargain collectively. There was, accordingly, a deep sense of injustice when the Court deprived it of an effective economic weapon, the secondary boycott, which was badly needed to aid in that fight. Indeed, the Court had even implied that the strike alone was within the statute. And, in the second place, there was a strong feeling, shared by many, that the triple damage penalty was itself both archaic and unfair as applied to labor.

LABOR'S CAMPAIGN FOR COMPLETE IMMUNITY

The campaign, already under way, to withdraw labor unions entirely from the scope of the federal antitrust laws, was now pressed with increasing vigor. Several attempts were made in Congress to achieve this end, without success.¹⁰⁰ Then, in 1911, in *Standard Oil Co. v. United States*, it was held that illegal business combinations could be dissolved under the provisions of the Sherman Act.¹⁰¹ This, coming after the *Loewe* case, caused Samuel Gompers and union leaders generally to become extremely apprehensive. Not only might labor be subject to a triple damage penalty in its struggle for recognition but, it would seem, there was a much more serious threat: the unions themselves might be dissolved.

Such was the situation which gave rise to Section 6 of the Clayton Act.¹⁰² Section 20 was essentially a procedural section, at least until very recently,¹⁰³ it was designed to strike at the evils of "government by in-

100. See FRANKFURTER & GREENE, *THE LABOR INJUNCTION* (1930) 139-141.

101. 221 U. S. 1 (1911).

102. Section 6 of the Clayton Act, 38 STAT. 731 (1914), 15 U. S. C. § 17 (1934), reads as follows: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

103. In *United States v. Hutcheson*, 61 Sup. Ct. 463 (U. S. 1941), Mr. Justice Frankfurter and three colleagues appear to have reached the conclusion that by reading the Norris-LaGuardia Act into § 20 of the Clayton Act, a great many labor restraints of trade are to be exempted from the Sherman Act. Regardless of what may be said of such a holding, it still would not seem to reach a sit-down strike accompanied by violence.

Even if § 20 is to be regarded as substantive, in view of its concluding clause, the activities of the defendants in the *Aper* case, not being within its terms, would not be given immunity.

junction." But Section 6 was directed at the basic question of the extent to which labor combinations and conspiracies were to be subject to the Sherman Act, if at all. There is no question, moreover, but that labor asked to be wholly exempted from the Act and the Congressional debates establish beyond doubt that Congress as a whole had no intention to go so far.

The issue was brought fairly before the House on June 1, 1914, in discussion of the amendment to Section 6 (then Section 7) proposed by Representative Webb. The Section, as first reported, consisted merely of what is now the long middle clause, in substantially its present form. Representative Floyd, and later several other members of the House, made the point that this provision did nothing more than to assure labor against prosecution for organization, *per se*. Accordingly the Webb amendment, which had been suggested by Representative Henry and several others, was proposed. It was worded substantially as is the final clause of Section 6 in the present Act and said: "nor shall *such* organizations . . . or members thereof be held or construed to be illegal combinations in restraint of trade under the antitrust laws." When it was pointed out that this clause too meant no more than that association in itself was not unlawful, Representative Thomas proposed a clear cut exemption to this effect:

"The provisions of the antitrust laws *shall not apply* to agricultural, labor, consumers, fraternal or horticultural organizations, orders or associations."

With the issue so clearly stated a vote was then taken on the Webb amendment and it was adopted. After considerable further debate, and on the same day, the Thomas amendment was voted on and rejected.^{103a}

103a. For the debate covering the introduction and passage of the Webb or Henry amendment and the rejection of the Thomas amendment see 51 CONG. REC. 9538-9569 (1914). One of the most revealing exchanges appears at 9567 where Mr. Webb, in charge of the bill, was being pressed by Mr. Murdock to say how far § 7 (now § 6) really was intended to go:

Mr. Webb. We wanted to make it plain that no labor organization . . . should be construed to be a combination in restraint of trade or a conspiracy under the anti-trust laws. *Now, I will say frankly to my friend that we never intended to make any organizations, regardless of what they might do, exempt in every respect from the law.* I would not vote for any amendment that does do that. [Applause].

Mr. Murdock. If the labor organization goes beyond the province of mutual help, then is it subject to the Sherman Antitrust laws?

Mr. Webb. If it violates the law, it is. Of course it is an organization subject to the law, and I ask if my friend from Kansas would vote to exempt it from all laws?

Mr. Murdock. I would vote to exempt it from being confined under the anti-trust laws to mere inactive existence.

Finally, on September 2, 1914, the Section was topped off with its famous opening line: "The labor of a human being is not a commodity or article of commerce." Congress had performed its mission.

The Clayton Act was written in the heat of a critical mid-term election campaign. Every member of Congress, in fact almost every person in the United States, was conversant with *Loewe v. Lawlor* and with the *Standard Oil* decision. The Section itself left no doubt that Congress intended to provide clearly that labor need not fear the latter decision; the Webb amendment, with its specific mention of "members," made the point doubly sure. But, though labor might organize without fear of dissolution, it was a different question *for what purposes* labor might organize and *how* labor might go about attaining its various demands. Far from saying that *Loewe v. Lawlor* should not apply, and that the secondary boycott was a proper method by which to attain union demands, the statute as adopted says simply that:

"Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . . ;"

What Congress did by this clause of Section 6 of the Clayton Act was to make clear that the Sherman Act did not stand in the way of labor's attainment of its basic rights.¹⁰⁴ Nor was this by any means a matter of no consequence. Over the past century, or at least from the time of *Commonwealth v. Hunt*, many courts and legislatures, it is true, had been expanding the permissible scope of labor activities. But the battle was far from won. Section 6 of the Clayton Act made sure that the Sherman Act, at least, should not be used to thwart this development—provided only that labor was "lawfully carrying out the legitimate objects" of union organization. Even Chief Justice Shaw had insisted that a strike "be carried out by fair or honorable and lawful means."¹⁰⁵ As to what are "legitimate" objects of labor Congress was silent; this

Mr. Webb. But the gentleman would not vote to exempt it and nobody else from all laws?

Mr. Murdock. I understand that, but I would give strikers the right to peaceful assemblage.

Mr. Webb. We give them that right in this bill.

Mr. Murdock. I doubt it very much.

104. For a spirited discussion of this bit of legislative history, see FRANKFURTER & GREENE, *THE LABOR INJUNCTION* (1930) 142-146. The question of construction, as these writers saw it, was this: "Did the section merely legalize what was already legal, i.e., the mere existence of labor unions, or did it completely immunize labor organizations from prosecution or suit under the Sherman Law?" Such, of course, has always been the question among labor leaders; *either all or nothing*, there can be no middle ground.

105. See p. 807 *supra*.

again was a matter for the courts to work out in the future. Except as so exempted, however, labor conspiracies in restraint of interstate trade were definitely to come within the Sherman Act.

In taking this position Congress had good precedent. The New York legislature had done very much the same thing in amending its old conspiracy statute; combinations of workmen were now not indictable as being injurious to trade where their purpose was to raise wages or to improve working conditions.¹⁰⁶ Likewise, in England, the Combinations Acts of 1799–1800,¹⁰⁷ which had forbidden labor combinations for even the more obvious purposes, were in time amended to permit a widening scope of activities.¹⁰⁸ There has been, therefore, no question as Mr. Justice Stone quite rightly says,¹⁰⁹ that labor organizations have been encouraged, and increasingly. But, at the same time, Congress has pointed out as clearly as words can that labor is not privileged to combine for non-legitimate purposes or to accomplish even its most worthwhile objects by unlawful means.

Thus, it would seem, the Court had applied the Sherman Act well enough "in the first instance"; the real concern had been over what it might do next. There is not a scrap of evidence in the Congressional debates indicating that Congress as a whole intended to sanction the secondary boycott as condemned in *Loewe v. Lawler*. In fact, quite the contrary.¹¹⁰ But at the same time there was wide support for labor organization *per se* and general recognition that, in the process of bargaining, labor must be permitted to use its economic power to some extent. At least the strike to attain legitimate objectives—as in *Loewe v. Lawlor* to gain union recognition—must be taken to have been fully approved. In fact all of the activities mentioned in Section 20—if for

106. New York a century ago passed its present general statute making a conspiracy "to commit any act injurious to the public health, to public morals, or to trade or commerce . . ." a misdemeanor. N. Y. PENAL LAW § 580(6). See *People v. Fisher*, 14 Wend. 2 (Sup. Ct. N. Y. 1835), where the act was applied to journeymen shoemakers who had refused to work for complainant until he discharged an employee who had undercut the union wage scale. In 1870 the statute was amended by exempting "the orderly and peaceful assembling or cooperation of persons employed in any calling, trade or handicraft for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate." N. Y. PENAL LAW § 582. See *Gill v. Smith*, 5 N. Y. Crim. Rep. 509 (1887).

107. 39 GEO. III, c. 81 (1799); 39 & 40 GEO. III, c. 106 (1800).

108. See 5 GEO. IV, c. 95, § 2 (1824); 22 VICT., c. 34 (1858); 34 & 35 VICT., c. 31, § c (1871); 38 & 39 VICT., c. 36 (1875).

109. 310 U. S. 469, 502, n. 23 (1940).

110. The question was debated principally in connection with § 20, several Senators fearing that that Section would legalize the secondary boycott. In the House the same point was made by Mr. Volstead. To which Mr. Webb replied: "I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man vote for it." 51 CONG. REC. 9658 (1914).

a legitimate object — would seem to be lawful for purposes of Section 6. That the result was to sanction a measure of restraint upon trade was beside the point; some eggs must be broken to make any omelette.

GREAT EXPECTATIONS AND THE GREAT BETRAYAL

Labor, in the person of Mr. Samuel Gompers, hailed the statute as an "industrial magna charta upon which the working people will rear their construction of industrial freedom."¹¹¹ That was putting the matter rather strongly. It does, however, testify to two or three things of importance. The first is that the cause of labor — even to gain recognition — had been in a very serious plight. Or, at least, was thought to have been. The second is that there was probably a broad gulf between what Mr. Gompers understood by "legitimate" labor objectives and what Congress may have had in mind. To the over-enthusiastic supporter of labor, even of today, labor can do no wrong. Of course everyone deprecates some of the violence, as Mr. Justice Stone did in the *Apex* case; that much must be said as a matter of convention. But the labor world is a world apart, much as that of big business was a generation ago, and it will not countenance governmental regulation — at least not willingly. It, like big business, wants nothing to do with the Sherman Act.

But Congress did not go so far as Mr. Gompers thought; moreover, the matter was again made one for the courts in the first instance: But, strangely enough, Section 6 of the Clayton Act has had only a very brief career. Its first appearance before the Supreme Court was practically its last. In 1920, in the *Duplex* case,¹¹² a secondary boycott injunction case circumstanced very much like *Loewe v. Lawlor*, Mr. Justice Pitney speaking for the majority gave the Section almost a full paragraph: "The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the Antitrust Laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from lawfully carrying out their legitimate objects. . . ." The section did not authorize "a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Antitrust Laws."¹¹³

111. "Those words, the labor of a human being is not a commodity or article of commerce, are sledgehammer blows to the wrongs and injustices so long inflicted upon the workers. This declaration is the industrial magna charta upon which the working people will rear their construction of industrial freedom." Samuel Gompers, (1914) 21 AM. FEDERATIONIST 971.

112. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921).

113. *Id.* at 469. And so it came to pass, as Frankfurter and Greene saw the *Duplex* case, that "The long-drawn-out battle on the national stage, to withdraw labor tactics from the risks of judicial notions concerning 'restraint of trade', was fought and lost." THE LABOR INJUNCTION (1930) 145-146.

The Section was said to be of importance, in the case before the Court, "for what it does *not* authorize, and for the limit it sets to the immunity conferred." And, since no member of the Court could say that it sanctioned the secondary boycott as a *lawful activity*, however *legitimate* the union's *purpose* might be, that ended the matter. The suit being one for an injunction, attention was then directed to Section 20, which deals particularly with the question of equitable relief. Possibly words could be found there to ban the injunction at least. Only Mr. Justice Brandeis, dissenting, seems to have been disturbed by Section 6, and he did not mention the Section directly. But, in his view, and he spoke very pointedly, it was for the legislature, and *not the judges*, to set the limits upon "group rights of aggression and defense."¹¹⁴ As he read the existing law, "industrial combatants" might "push their struggle to the limits of the justification of self-interest."

Perhaps Mr. Justice Brandeis did not doubt the ability of his colleagues to determine what are *legitimate* union objectives; the Court has passed upon many more complicated questions in its time and with credit to itself. One suspects that he doubted rather their sensitiveness to the needs of labor as he saw them. At all events it has long since become a virtual "party line" among labor protagonists to insist that the courts are not qualified to understand labor questions. When the next injunction-boycott case, the *Bedford* case, came before the Court in 1927,¹¹⁵ the majority made no mention at all of Section 6. And the minority, though still preoccupied with Section 20, went back to first principles to say that the particular boycott charged, a bare refusal to work on non-union cut stone, was not the sort of restraint at which the Sherman Act was directed.

THE CLAYTON ACT FORGOTTEN

Such is the long and troubled story of events which led up to the *Leather Workers* case and the two *Coronado* decisions mentioned above. In these cases Chief Justice Taft did not so much as mention Section 6, that magna charta of organized labor. Perhaps the Chief Justice had become a "fellow traveller" with Mr. Justice Brandeis, and agreed that it is not for the courts in *any* instance to say whether a factory or mine strike to gain union recognition is a *legitimate* function of organized labor. That would be beyond a judge's comprehension. And so the

114. *Id.* at 488: "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is *not for judges* to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

115. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U. S. 37 (1927).

Court plunged into its involved subjective inquiry distinguishing between "direct" and "incidental"; whether the union really "intended" (1) to "control the supply [of coal] entering or moving in interstate commerce," or (2) merely to win a "local" strike. It would have been simpler — however much political credit would have had to go to the Clayton Act — and much more discriminating, to say, first, that the defendants' labor purpose in each of these cases was quite *legitimate*. No one, indeed, has any doubts on the point.

The union purpose being legitimate, the case would then have turned on whether the purpose had been *lawfully* carried out. Congress did not say what it meant by lawful; indeed, the word did not appear in the statute until after the bill had reached a Conference Committee of the Senate and the House. When the compromise bill was reported back to the House by Representative Webb, Representative Stafford inquired as to the purpose of the word "lawfully." In answer, Mr. Webb said:

"I do not know what moved the Senate to put that word in. We had no objection to it, and hence accepted the amendment."¹¹⁶

Such is the evidence as to the legislative "intent"; evidently no one felt free to suggest that labor should be permitted to use "unlawful" means to attain its ends.

There are at least two possible constructions of "lawfully" as used by Congress in Section 6 of the Clayton Act. It could be said to include every incident, however minor, which might grow out of a trade dispute: traffic light violations, loitering, disturbances of the peace and so on. If so, then truly "every strike in any industry or even in any single factory will be within the Sherman Act," as Chief Justice Taft said.¹¹⁷ At least, if the Section is so construed, Congress has extended no immunity to labor. But no one, of course, suggests such a construction. Obviously the term is to be fitted into the restraint of trade law with which Congress was dealing. Conspiracies may be condemned, we are told, either because the *objective* contravenes the statute or because the *means* adopted are themselves too drastic.¹¹⁸ Had "unlawfully" been omitted from Section 6, labor could have gone to what extremes it chose in tying up the commerce of the country, so long only as its particular demands, of however little relative importance, were legitimate. It would seem, however, that Congress did not mean so much. "Self interest" — even of labor — must recognize the public welfare.¹¹⁹

116. 51 CONG. REC. 16276 (1914).

117. See p. 791 *supra*.

118. "'Conspiracy' is a familiar term of art and means a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means." Chief Justice Hughes dissenting in the *Aper* case, 310 U. S. 469, 516 (1940).

119. As an abstract proposition Mr. Justice Brandeis would recognize this; the right of "industrial combatants" to push their struggle "to the limits of the justification of

"Unlawfully," therefore, like "legitimate," must be construed against the evident Congressional purpose to give labor a limited immunity under the anti-trust laws. Labor may organize and carry on, but it must show cause in any given case involving restraint of trade that its purposes are "legitimate" and that the means adopted to attain them are not themselves "unlawful," that is, unduly disruptive of trade. It must not be forgotten that the Sherman Act itself contained no catalogue of particulars, but was to be given life and meaning by the courts as cases should arise. The scope of labor's immunity from that statute, within which it could and should build its own "industrial freedom," was to be fashioned in exactly the same way. Nor need the Court flinch from the task because of a becoming modesty as to its abilities; it is not the final authority in a democracy.

The idea of a limited immunity, moreover, was by no means new, for the courts themselves had long since carved one out in favor of those persons who had businesses to sell.¹²⁰ A covenant by the seller not to engage in business thereafter in opposition to the buyer, though an admitted restraint upon his trade (and perhaps even having an effect upon prices in the market place, though the point was not important) was not ordinarily within the doctrine. Businesses and freedom from the restraint of trade laws could be sold—if, as the courts said, the restraint was "reasonable." Or, as Congress provided in the case of labor activities, if they were "legitimate" and "lawfully" carried out.

Nor was the basic philosophy underlying this exception hidden from the Court. Of the many statements which could be quoted, that by Tindal, C. J., in *Horner v. Graves*, is as good as any:

"We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on grounds of public policy."¹²¹

The real issue before Chief Justice Taft in the *Leather Workers* case, then, was fairly simple. The union demanded recognition, just that; a wholly "legitimate" purpose, if unions are to exist at all. The principal

self interest" was not thought to have any constitutional or moral sanction. "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community." 254 U. S. 443, 479, 488 (1920).

120. See the detailed exposition of this exception in McLAUGHLIN, *CASES ON THE FEDERAL ANTI-TRUST LAWS* (1933) 1-15.

121. 7 Bing. 735, 743 (C. P. 1831). The case involves a dentist's assistant's covenant not to compete but its philosophy is that of the earlier sale of business cases.

means adopted was the strike, perhaps the simplest use of economic pressure which the union could have employed. In any restraint of trade sense it was obviously "lawful"; only the trade of the employer was directly affected and even he could continue to manufacture and ship in interstate commerce, if he could persuade non-union men to work for him. That there may have been assaults and slanders in the process was a matter for the St. Louis police. Had Tindal, C. J., been sitting on the case he would have said — provided that he could have been convinced that labor is entitled to organize at all — that the restraint was only such "as to afford a fair protection" to the union and, since the restraint was "not so large as to interfere with the interests of the public," it was quite lawful.

THE PRESENT COURT AND SECTION 6

Suppose that drastic means had been employed. I do not, of course, wish to be understood as suggesting that anything of the sort could ever occur. But still, suppose that the union had burned the company's factory and stock of goods, had bombed the trucks doing hauling to and from the plant, had derailed any trains carrying finished goods or raw materials, had forced the hide storage houses throughout the country to close. Or, if that is not drastic, had boycotted the company's products wherever sold and the dealers in those products and those who dealt with the dealers, possibly tossing in a bomb here and there for good measure. That would seem to be a very different case. In all probability Tindal, C. J., would say that such restraints were "oppressive." Much as it is to the public interest to have an organized, well paid, and self respecting working population, it can be purchased at too great a price in terms of trade disruption. Such wholesale interference with a free market, and of the rights of other businesses and of other employees alike, has heretofore *always* been thought to constitute unlawful restraint of trade.

But, strangely, it would *not* be a violation of the Sherman Act in the view of Mr. Justice Stone and his colleagues. They would have no hesitation, of course, in saying that trade had been "directly," "substantially," and "intentionally" restrained. But, without some showing that there had been an intended effect on "price competition," it would not now be the "kind" of case at which the Sherman Act is directed. Or, stated differently, without a showing that the attempted domination of the leather industry¹²² — from cow to consumer — was for the purpose of eliminating competition "between union and non-union goods," there

122. Why this obsession concerning domination of the market and price competition? Is it not equally a restraint of trade even although only a single individual's trade, however small, has been restrained by an unlawful conspiracy? To limit the application of the statute to only such combinations as affect *national prices* means that the small

could be no violation of the Act. Not that elimination of such competition has *ever* been thought to be within the Sherman Act, for, as the Court says, the contrary is true. Not that there is anything in the wording of the Act—or in its legislative history—or in the long common law development which it incorporates, which says that “price competition” is to be our *sole* salvation. For, again, the exact opposite is the case. But—one must have some reason for a decision, it seems.

The cliché—that the Sherman Act is not to “police” strikes or transportation—serves the majority’s purpose no better. Against even so brief a study as this, such a doctrinaire assertion discloses a singular lack of understanding. The idea upon which our restraint of trade law rests is that of a free market, free in the widest sense, with free access to that market by *labor* or *business* or *consumer* as a necessary corollary. While labor—because of the public interest in equalizing its bargaining position—is privileged to burden and interrupt interstate commerce at one point or another, its privilege must be proportioned to the public interest in the end sought to be attained. With that exception, manufacturing and transportation cannot be substantially burdened without violation of the Sherman Act—whether by labor, by competitors, by bankers, by wholesalers or whoever. Even a Jesse James conspiracy to rob trains of hosiery—the academic illustration posed by the Court¹²³—would come within the statute, if any one were simple enough to use a misdemeanor statute for such an offense.¹²⁴

But the point is best made by Chief Justice Hughes in his dissenting opinion. As he says, the Court’s opinions in the past have made much of the idea of a “free flow” of interstate commerce.¹²⁵ “What is this metaphor of an interstate stream protected in its flow by the Sherman Act but a striking way of describing the movement of goods by untrammelled

trader or business man can be frozen out of interstate commerce with impunity,—because his elimination would be too small an event to affect the “market.” The old Court was not so callous. Nor so unfamiliar with the “well understood” principles of the common law of restraint of trade. For a good discussion on the point see Cavers, *Labor v. The Sherman Act* (1941) 8 U. OF CHI. L. REV. 246, 254.

123. 310 U. S. 469, 487 (1940).

124. Of course, in the old law, the highway robber was hanged.

125. A great many highly respected opinions could be cited on this point. For example: “It [the Sherman Act] broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce.” Mr. Justice Day, in *Eastern States Retail Lumber Dealers’ Association v. United States*, 234 U. S. 600, 609 (1914): “. . . Only such contracts and combinations are within the Act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.” Mr. Justice Holmes, in *Nash v. United States*, 229 U. S. 373, 376 (1913). And see *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 360 (1933) and cases there cited. The suggestion of Mr. Justice Stone and his colleagues that these Courts must have meant something quite different than they said simply cannot be accepted.

shipments in pursuance of freely negotiated sales?"¹²⁶ And, even more to the point:

"Moreover, of what avail is it to interdict boycotts or to assure a free market, that is, to secure freedom in obtaining customers, and yet to leave unprotected the right to ship goods to the customers who are thus obtained? Of what advantage is it to solicit orders freely in interstate commerce if they cannot be filled? The freedom of interstate movement—immunity from conspiracies directly to restrain shipment and delivery—lies at the very base of a free market and the untrammelled making of sales."¹²⁷

The plain fact of the matter, of course, is that Mr. Justice Stone and the majority simply chose to disregard Section 6 of the Clayton Act. Not that the opinion does not mention the Section, for it does that—and no more—at several places. But the opinion is wholly without comprehension of what the Section says and means. This is painfully evident at the conclusion, where Mr. Justice Stone is seeking to clinch his self-contradicted argument that some intent to eliminate *competition* must be shown in order to bring any labor case within the Sherman Act. Referring to several prior decisions, but particularly to the *Leather Workers* case, the *Levering* case, and the first *Coronado* case, he says: "These cases show that activities of labor organizations *not immunized by the Clayton Act* are not necessarily violations of the Sherman Act."¹²⁸ Of course, as pointed out above, the activities in those cases would have been immunized by Section 6 of the Clayton Act, had that Section been applied; the Court in deciding them held nothing whatever to the contrary. Mr. Justice Stone simply chose to beg the question; and on that he rested his case.

Had the majority in the *Apex* case chosen to apply Section 6 as written, the area of judicial discretion would have been both narrow and fairly well defined. In fact, much as Mr. Justice Brandeis would have had it, if he meant literally what he wrote in the *Duplex* case. Finding first a substantial restraint upon commerce, as the Court did, and secondly a "legitimate" labor purpose, as also may be assumed for the moment, the question would have turned simply on whether a "sit-down" strike is "lawful" in a restraint of trade sense. Such was, to all intents and purposes, the problem in the second *Coronado* case, though there the union's appropria-

126. 310 U. S. 469, 526 (1940).

127. *Id.* at 523.

128. *Id.* at 512. Once it is decided that the activity in question would have been an unlawful conspiracy in restraint of trade at common law, or according to the Court's decisions prior to 1914,—and further that it would not be an activity immunized by § 6 of the Clayton Act—the Court "has no option but to apply the Sherman Act in accordance with its express provisions." This was substantially the position taken by Chief Justice Hughes in his dissent. 310 U. S. 469, 529 (1940).

tion and destruction of the mines was not called a "sit-down" strike—the mines being flooded, it perhaps could not well have been. Having satisfied himself that the defendants *intended* to restrain the supply of coal moving in interstate commerce, Chief Justice Taft found a violation of the Act.¹²⁹ Had the question been put in terms of whether defendants' actions were fairly calculated to accomplish their ends with no more than a necessary disturbance of trade, the Chief Justice might still have found for the plaintiffs. If so, defendants' actions would have been declared "unlawful," as the term is used in Section 6 of the Clayton Act.

So it would seem the sit-down strike in the *Apex* case was "unlawful." In addition to the considerable damage done to the machines used to produce goods for interstate commerce, defendants intentionally and by force prevented the company from shipping finished goods to fill its interstate orders. Chief Justice Taft probably would have found an intent to interfere "directly" with interstate commerce and let it go at that; "see our decision in the second *Coronado* case." But the essential question is one of reasonableness, that is, whether the means adopted by the union were fairly proportioned to the public's interest in seeing the union's bargaining position strengthened. That the strikers may have intended to eliminate competition between union and non-union made hosiery would go in *justification* of their purpose, not in *condemnation*. But it is difficult to see how anyone could reach a conclusion that the *means* employed were "lawful" in a restraint of trade sense. A "peaceful" sit-down strike, on the other hand, might well be something else again.

LABOR DEMANDS AND THE WAGNER ACT

There is a further consideration of importance; a good deal of water has gone over the dam in the quarter century since the Clayton Act was passed. What might have been a "lawful" activity twenty-five years ago is by no means so clearly so now. With the adoption in 1935 of the National Labor Relations Act, Congress took a further step "to eliminate the causes of certain substantial obstructions to the free flow of commerce," this time, "by encouraging the practice and procedure of collective bargaining."¹³⁰ The machinery set up under that Act has greatly advanced labor's struggle for recognition. Or, as Mr. Justice Brandeis

129. So far as appears, any creditable evidence upon the point would have sufficed. It happened that the evidence offered showed that defendants had so far looked beyond the "local" strike as to see that the sale of non-union coal in the interstate market in competition with union-mined coal would affect injuriously the maintenance of union wages. It followed that they "intended" to restrain commerce, not merely to win a "local" strike. Mr. Justice Stone's partial quotation (at 511) from the Taft opinion, making it appear that the Chief Justice had insisted upon a showing that there was some intent to eliminate "competition" as such, in order to constitute a violation, is one of those unconscionable things.

130. NLRA §1, 49 STAT. 449 (1935), 29 U. S. C. §§151-166 (Supp. 1940).

would say, the "legislature" has at last substituted "processes of justice for the more primitive method of trial by combat." The "limits of permissible contest," once widened by the Clayton Act, have now been measurably narrowed. So much so that it would seem that no labor tie-up of commerce, hereafter, if merely to attain an end which could otherwise be gained by an orderly resort to the ballot, should be thought "lawful." By so much the judges have been relieved of their burden of setting bounds to "group rights of aggression and defense."

But Mr. Justice Stone and his colleagues paid even less attention to the Wagner Act, if possible, than to the Clayton Act. A passing reference is made to it, but only to support the point, later denied in the opinion, that combinations of workers designed to restrict "competition among their employers based on wage cutting" are not against public policy.¹³¹ The Chief Justice, however, suggested that it was anomalous for the Court to press the Wagner Act to great lengths to combat unfair employer tactics and then to go equally far to the other extreme to exempt labor under the Sherman Act.¹³² The suggestion, somewhat oblique at best, has its political aspects. It would have been harsh to have insisted too strongly that the strikers in the *Apex* case should have laid their troubles before the Labor Board. It is true that the Supreme Court had decided some days previous to the strike that the Act was constitutional.¹³³ But, even so, labor, like business, was still under the spell of the earlier Liberty League decision to the contrary.

Labor, however, has a great many "demands" — many beyond the jurisdiction of the Labor Board to pass upon. The Court in the *Apex* case appears to have assumed them all to be of one kind; the question before it, the Court said, was whether "a conspiracy of strikers in a labor dispute to stop the operation of the employer's factory in order to enforce their *demands* against the employer is the kind of restraint of trade or commerce at which the Act is aimed." This was a very much over-simplified way of stating the case. All "demands" are by no means highly virtuous ones for union recognition. It evidently would not have been material to the Court, even had the wage scale at the Apex company's plant been the highest in the industry and the working conditions the best. Indeed, the general body of workmen may already have been recognized by the Labor Board as an independent union and the proper bargaining agent for the plant, so far as one can tell from reading the opinion. It is evident that a strike for recognition may, in a given case,

131. 310 U. S. 469, 504, n. 24 (1940).

132. *Id.* at 528. To which the majority said, whatever they may have meant, that: "If any other answer than a comparison of the legislative history and objectives of the two acts, and our decisions under them, were needed, it seems obvious that the Sherman Act cannot be said to subject employees to a liability which it does not impose on employers or others." *Id.* at 513, n. 28.

133. *NLRB v. Jones & Laughlin Steel Co.*, 301 U. S. 1 (1937) (decided on April 12, 1937).

have as its purpose nothing more worthwhile than a desire to increase the flow of dues into the national union treasury. Surely the Court can not be blind to such matters when passing on the reasonableness of union activities.

The majority of the Court, it would seem, are still fighting labor's battles of thirty and forty years ago — when *Loewe v. Lawlor* was much disputed. So anxious are they to strike down those early cases that they have not bothered to see that labor — as respects interstate business at least — has fairly won its struggle for recognition: the struggle which enlisted their sympathies, initially. Such a state of facts as existed in the *Bedford* and *Duplex* cases need seldom, if ever, come before the courts again—unless the Wagner Act is repealed. And, even in such event, were the Court to hold, as it might quite reasonably do, that a peaceful refusal to work on non-union made goods, in order to win *union recognition*, is lawful within Section 6 of the Clayton Act, it would by no means follow that such activities had become lawful for *all* purposes. To sanction a widespread disruption of trade, the union must have some legitimate union purpose — as to raise wages, reduce hours, or improve working conditions.

Accordingly, it may fairly be said that the Supreme Court has, in this instance at least, badly fumbled the job which Congress entrusted to it by the Clayton Act. Important as it is to encourage collective bargaining, it will no more do today to permit a labor monopoly to shelter uneconomic restraints of trade than was true in olden times in England, when the Guild monopolies had to be broken up. Nor to attain its most worthwhile objectives by widespread destruction of trade. While it may perhaps be said that the Sherman Act is not the right device to “administer” labor disputes, it may be replied that the statute does not purport to be for “administration” — either of labor or business disputes. Neither does it prevent the use of administrative machinery. But the record is fairly clear that, for its part, the Supreme Court has made almost no effort at administration, even to distinguish between the most obvious cases of “good” and “bad” labor activities.¹³⁴ The present Court, at least, is not wholly inept in such matters; its commission is to do a constructive job for the *public* welfare.

Finally — and quite apart from labor — one can but look at the *Apex* case with misgivings. It announces — a “new contribution”¹³⁵ — that since 1911 some form of restraint of “commercial competition” has been a *sine qua non* in every Sherman Act case. In so saying it has not even

134. For a statement of the policy of the Department of Justice in this field, see ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940) 249-253.

135. This is the expression of Judge Learned Hand, in *United States v. Gold*, 115 F. (2d) 236 (C. C. A. 2d, 1940). The court there reluctantly set aside convictions growing out of a particularly vicious conspiracy in restraint of trade, there being no showing of an intent to limit *competition* in “business and commercial transactions.”

read its own *business* cases accurately.¹³⁶ But, waiving that, surely the members of this court know that "competition," even "price competition," is not an *end* in itself. In large areas, as the Court knows, it does not function at all. But even as Adam Smith viewed the thing, competition was merely a *means* to an end—a means whereby to attain the benefits of a free market.¹³⁷ Or, as Senator Sherman put it, to secure the "industrial liberty of the citizens."¹³⁸ Surely this Court will not be the one to strike down such protection as the old "common-law principles" afforded the small trader—merely because it might not be possible to show an effect on "prices."¹³⁹ If so, our losses exceed the paltry¹⁴⁰ \$711,932.55, which the Court saved to the hosiery workers.¹⁴¹

136. It is true, as Mr. Justice Stone says at 495, that most of the cases to come before the Court in recent years—apart from those involving labor—have had to do with arrangements designed to limit production or to fix prices. So what? It certainly does not follow, as the Court assumes, that *only* such cases are therefore to be brought within the Act. In fact, striking examples of cases not involving "business" or "price" competition are *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 (1930); and *United States v. First National Pictures, Inc.*, 282 U. S. 44 (1930). These cases were decided on the ancient and "well understood" ground that a combination to deny *access to the market* is itself a violation of the statute.

137. It must be remembered that the "well understood" common law principles protecting trade long antedate the thought that "competition" will alone and unaided bring about the industrial millenium. See Holdsworth, *The Importance of Adam Smith's Wealth of Nations in English Legal History* (1933) 2 U. OF CHI. L. REV. 533.

138. "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundations of the equality of all rights and privileges." Statement by Senator Sherman when introducing his bill, 21 CONG. REC. 2457 (1890). "The unanimity with which foes and supporters of the bill spoke" of these aims, in *addition* to that of "protection of free competition, permit use of [the full] debates in interpreting the purpose [or purposes] of the act." 310 U. S. 469, 495, n. 15 (1940).

139. The bare *right to pursue one's business or calling* is fundamental. A conspiracy to drive out a small business or to prevent men from working, because of racial, religious or political intolerance, regardless of any effect on prices, has always been an unlawful restraint of trade. Trade has to do with buying and selling, yes, but its basic meaning is the pursuit of a calling. Physicians may not adopt "rules of ethics," for example, to prevent their more venturesome brother physicians from charging for their services on a "contract" basis. See *Pratt v. British Medical Association* [1919] 1 K. B. 244, 274, where the court said: "The public interests must be regarded conjointly with the interests of individuals when restraint of trade is in question. . . . Upon considering the rules in question I have arrived at the conclusion that they are in *restraint of trade*, and are void on the ground of public policy. They gravely, and in my view unnecessarily, *interfere with the freedom of medical men in the pursuit of their calling*, and they are, I think, *injurious to the interests of the community at large*." Here was no false modesty as to the ability of the court to act in the *public* interest, whatever it may have known about the needs of the medical profession. And see *United States v. American Medical Ass'n*, 110 F. (2d) 703 (App. D. C. 1940), *cert. denied*, 310 U. S. 644 (1940).

140. Paltry, that is, to a law school instructor.

141. The defendants, who would have had to pay the judgment were William Leader and American Federation of Full Fashioned Hosiery Workers, Philadelphia, Branch No. 1, Local No. 706.